United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1733

To be argued by
BERNARD J. BONN III

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1733

UNITED STATES ex rel. JOSE GONZALEZ,

Petitioner-Appellant,

-against-

HON. J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.

Appeal from the United States District
Court for the Southern District of New York

BRIEF AND APPENDIX FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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Docket No. 74-1733

UNITED STATES ex rel. JOSE GONZALEZ,

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-against-

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BRIEF AND APPENDIX FOR PETITIONER-APPELLANT

Preliminary Statement

Petitioner-appellant, Jose Gonzalez, appeals pursuant to 28 U.S.C. Section 2253 from an order of the United States District Court for the Southern District of New York, entered on April 1, 1974 by Judge Lawrence W. Pierce, which denied without a hearing petitioner's application for a writ of habeas corpus pursuant to 28

U.S.C. Section 2254. The decision of Judge Pierce is reproduced on pages A3-A10 of the Appendix to this brief. On May 23, 1974 Judge Pierce granted petitioner's motion for a certificate of probable cause and leave to appeal in forma pauperis. On June 6, 1974, this court granted petitioner's motion for assignment of counsel.

Questions Presented

1. The full-scale search of petitioner's apartment following the arrests of Rios and Moran violated petitioner's rights under the fourth and fourteenth amendments and the fruits of that illegal search should have been suppressed.

2. The police did not have valid probable cause to arrest and search petitioner when he returned to his apartment and thus the fruits of that search including petitioner's oral admissions were obtained in violation of his rights under the fourth and fourteenth amendments and should have been suppressed.

3. Petitioner's oral admissions, and the evidence seized from petitioner following his arrest were tainted by the illegal search of petitioner's apartment and should have been suppressed.

4. The admission into evidence at trial of the fruits of the illegal searches and seizures was not harmless error.

5. This court should remand to the District Court for hearing the issues raised by petitioner's claim that he was illegally arrested for loitering as a pretext to gain entrance to his apartment.

Proceedings Below and in the State Courts

On March 4, 1971, petitioner was convicted in Supreme Court, Bronx County, New York, after a jury trial of criminal possession of a dangerous drug in the first degree and of criminal possession of a dangerous drug in the third degree. Prior to trial, on January 26 and January 27, 1971 a hearing was held to decide petitioner's motions to suppress the tangible evidence seized by the police in their search of petitioner and his apartment and to suppress certain oral admissions made by petitioner following arrest. (References to the hearing minutes are preceded by H.) Both motions were denied. On April 19, 1971 petitioner was sentenced to 20 years to life for his conviction for possession in the first degree and was given a concurrent indeterminate term of five years imprisonment for his conviction for possession in the third degree.

On March 14, 1972, with two justices dissenting, the Supreme Court of the State of New York, Appellate Division, First Department, affirmed the conviction of petitioner. People v. Gonzalez, 38 App. Div.2d 912 (1972). The New York

Court of Appeals affirmed the conviction on November 30, 1972, People v. Gonzalez, 31 N.Y.2d 787 (1972) and certiorari was denied by the United States Supreme Court. Gonzalez v. New York, 410 U.S. 988 (1973).

On May 16, 1973 petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. On June 12, 1973 the petition was assigned to Judge Pierce who referred it to Magistrate Charles J. Hartenstine for a report and recommendation. On January 11, 1974 the magistrate recommended that the petition be denied without a hearing and on April 1, 1974 Judge Pierce denied the petition without a hearing. Petitioner filed a notice of appeal on May 23, 1974 and on that same day Judge Pierce granted petitioner's applications for a certificate of probable cause and for leave to appeal in forma pauperis.

Statement of Facts

The essential facts are not in dispute. The only issue is their constitutional significance. On approximately October 14, 1970, patrolman James A. Jones of the Narcotics Enforcement Unit of the New York City Police Department while on patrol in the Bronx was approached by an unidentified and admittedly unreliable informant (H26) who allegedly identified petitioner as a narcotics dealer. Two weeks later, on

October 28, 1970, at 12:30 P.M. Jones was again on patrol in the Bronx with two other police officers when he was again approached by this same informant who told him that the individual he had previously identified as a narcotics dealer had just been arrested and that it was a good time to go to his apartment.

Dressed in civilian clothes and without a search warrant, Jones and his fellow officers proceeded to petitioner's apartment. Jones went to the front door, knocked and was admitted by Antonia Rios who, after conferring with Luis Moran, sold Jones 15 packets of heroin. Following the transaction, Jones arrested Rios and took her into the bedroom area where he arrested Moran. At the time of Moran's arrest, he had been engaged in filling glassine envelopes with a white powder later identified as heroin.

After the other officers were admitted into the apartment by Jones, they led Rios and Moran into the bedroom area. While the other two officers stood guard over the two handcuffed occupants, Jones began a full-scale warrantless search of the apartment. On the dresser where Moran had been filling envelopes, Jones found approximately 28 ounces of heroin and $543 in currency which were Exhibits 1 and 2 respectively at the trial. Under the kitchen table he discovered a brown bag with two containers of white milk powder, a substance commonly used in diluting heroin. (Exhibit 3 at trial.) In

a closet, he found a brown tweed suitcase containing narcotics paraphernalia used in cutting heroin which included "a scale, measuring spoons, plastic bags, scotch tape, strainers and numerous glassine envelopes of various sizes." (46) (Exhibit 4 at trial.) After Jones completed his search of the apartment, Miss Rios was confronted with the heroin, the narcotics paraphernalia, the currency and the white milk powder and allegedly stated that everything in the apartment belonged to Jose. (H 12-14). Despite having been told by their informant that petitioner had been arrested, the police decided to wait for his possible return. At approximately 4:45 P.M. there was a knock at the door. When Jones opened the door, he found petitioner, who had been absent from the apartment for several days (163), petitioner's brother-in-law, Luis Rivera, and one Alberto Gonzalez. The three were immediately placed under arrest and searched. During the search of petitioner, Jones found a three-ounce packet of heroin and a brown grocery bag containing five boxes of empty glassine envelopes. (Exhibit 5 at trial.)

According to Jones' testimony, shortly after being confronted by the fruits of the searches of petitioner and the apartment, petitioner stated that everything in the apartment was his and that the others should be released. A similar statement was allegedly repeated by petitioner

at the station house, again while all of the items seized by the police were in full view. Petitioner's motions to suppress both the tangible evidence seized by the police and his oral admissions were denied.

Although petitioner had not been found in actual possession of the narcotics seized in the apartment, the prosecution, relying heavily on petitioner's status as lessee of the apartment, his oral admissions following arrest and the presence of narcotics paraphernalia and the white milk powder in the apartment argued at trial that petitioner had been in constructive possession of the 28 ounces of heroin found in the possession of Rios and Moran. In his instructions to the jury, the trial judge stated that the paraphernalia and the white powder "may be evidence tending to prove or disprove guilt" (217) and that the paraphernalia found in the apartment "are used for cutting heroin. That is, mixing the pure heroin, with an inert or harmless powder, so as to dilute the strength of the heroin itself." (223) The jury, after three hours of deliberation, convicted petitioner on both counts.

Point I

The Full-Scale Search of Petitioner's Apartment Following the Arrests of Rios and Moran Violated Petitioner's Rights Under the Fourth and Fourteenth Amendments and the Fruits of That Illegal Search Should Have Been Suppressed

The fourth amendment to the United States Constitution, as made applicable to the states by the fourteenth amendment,

Mapp v. Ohio, 376 U.S. 643 (1961), prohibits all unreasonable searches and seizures by state officials. Ker v. California, 374 U.S. 23 (1963). The warrantless search of petitioner's apartment in this case constituted just such a violation of his fourth amendment rights.

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won--by legal and constitutional means in England, and by revolution on this continent--a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." Coolidge v. New Hampshire, 403 U.S. 443, 454-5 (1971) (footnotes omitted).

Despite this admonition, the police in this case after the occupants of the apartment had been arrested, handcuffed and placed under guard, after all evidence in "plain view" had been seized and after the police had verified that there was no one else in the apartment, proceeded to engage in a flagrant and highly unnecessary violation of the fourth amendment by conducting a warrantless, full-scale search of

petitioner's apartment. It was during that search that the police discovered the narcotics paraphernalia and the large quantity of white milk powder.

Faced with this obvious violation of petitioner's fourth amendment rights, Coolidge v. New Hampshire, supra, Chimel v. California, 395 U.S. 752 (1969); United States v. Artieri, 491 F.2d 440 (2d Cir. 1974); United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973), respondent conceded below in the District Court (Affidavit of Rochelle M. Baron at 8) that the search of petitioner's apartment had been illegal and the District Court so held. Nor was there any question that petitioner had standing to object to the use at his trial of the fruits of the illegal search of his apartment, Alderman v. United States, 394 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960), especially since petitioner was charged with constructive possession of narcotics found in the possession of others. United States v. Love, 472 F.2d 490 (5th Cir. 1973). The District Court, however, erred in rejecting petitioner's further claim that the heroin found in his pocket and his oral admissions following arrest should also have been suppressed either as fruits of the illegal search and seizure of petitioner's apartment or as fruits of an unlawful search of petitioner following his arrest without probable cause.

Point II

The Police Did Not Have Valid Probable Cause to Arrest and Search Petitioner When He Returned to His Apartment and Thus the Fruits of That Search Including Petitioner's Oral Admissions Were Obtained in Violation of His Rights Under the Fourth and Fourteenth Amendments and Should Have Been Suppressed

It is settled law that the illegally seized paraphernalia could not have served as a basis for probable cause for petitioner's arrest. Wong Sun v. United States, 371 U.S. 471 (1963). Thus, at the time of petitioner's arrest, the only valid information within the knowledge of the police that could have been utilized in establishing probable cause for his arrest was the word of an admittedly unreliable informant that petitioner was a heroin dealer and that he occupied a particular apartment in which the police subsequently discovered Rios and Moran--not petitioner--engaged in selling heroin. Even following the search of the apartment, the police were without reliable information that petitioner occupied the apartment or was connected with the heroin found on the premises. Thus, it is submitted that this limited knowledge within the possession of the police did not satisfy the test for probable cause:

> "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964).

Certainly mere suspicion that petitioner had committed or was committing a crime was not sufficient basis for arrest. Recznik v. City of Lorain, 393 U.S. 166 (1968); United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974); United States v. Jit Sun Loo, 478 F.2d 401, 405 (9th Cir. 1973). Nor was there any basis for the police to conclude that Miss Rios, who implicated "Jose" following the search of the apartment, was a reliable informant, Pulido v. United States, 425 F.2d 1391 (9th Cir. 1970), or that "Jose" was petitioner. Moreover, as will be demonstrated infra, her statement should also have been suppressed as the product of the illegal search of petitioner's apartment. Wong Sun v. United States, 371 U.S. 471 (1963). While there are instances in which the word of an informant can serve to establish probable cause for arrest, e.g., Draper v. United States, 358 U.S. 307 (1959), those cases involve highly reliable informants plus substantial corroboration of the information through surveillance or otherwise. United States v. Canieso, 470 F.2d 1224 (2d Cir. 1972). Pulido v. United States, supra, 425 F.2d at 1394-5;

In the instant case, Jones had only the word of an unknown and admittedly unreliable informant and evidence that others were selling heroin in an apartment identified by the informant as petitioner's. Yet, during the course of the

arrest of Rios and Moran and prior to the arrest of petitioner the police corroborated no information provided by the informant regarding petitioner's connection with the heroin or the apartment. Thus, although the police knew that heroin was on the premises and was being sold there, that did not establish probable cause to arrest petitioner. United States v. Connolly, 479 F.2d 930, 936 (9th Cir.), cert. dismissed, 414 U.S. 89 (1973).

There was a four hour period from the time Jones received the informant's tip until the arrests of Rios and Moran,--contrary to Jones' testimony that he went directly to petitioner's apartment following the tip--and during that period the police could have run a check on petitioner's criminal background. Any evidence of petitioner's prior involvement in narcotics, if there were any, might have provided more of a basis for an arrest, but there is no suggestion that the police did so. Of course, the mere fact that petitioner had a criminal record or associated with undesirables, would not alone have established probable cause. Sibron v. New York, 392 U.S. 40 (1968); United States v. Solis, 469 F.2d 1113, 1115 (5th Cir. 1972), cert. denied, 410 U.S. 932 (1973). Certainly the police did not have probable cause to arrest whomever they found in the apartment merely because they knew that narcotics were present without

regard to who that person might be, how long that person might have been in the apartment and what relationship that person may have had to those engaged in criminal activity. United States v. Connolly, supra, 479 F.2d at 936. Even certainty that a crime is being committed within a dwelling does not constitute probable cause to arrest whomever the police subsequently find on the premises. Johnson v. United States, 333 U.S. 10 (1948); United States v. Connolly, supra. And there can be no question that petitioner's actions in returning to his apartment following the arrests of Rios and Moran were in and of themselves outwardly innocent. "[A]n arrest is not justified by what the subsequent search discloses." Henry v. United States, 361 U.S. 98, 104 (1959).

Petitioner does not contest that assuming a valid arrest, the police may conduct a complete search of a suspect and use the fruits of such a search against that individual in a subsequent criminal proceeding. United States v. Robinson, 414 U.S. 218 (1973); United States ex rel. Newsome v. Malcolm, supra, 492 F.2d at 1174. But, it having been established that the search of petitioner was conducted without probable cause, one is forced to conclude that the heroin found in his pocket and the grocery bag containing five boxes of empty glassine envelopes should have been suppressed as the fruits of an

unlawful search. Furthermore, petitioner's oral admissions following arrest should also have been suppressed as fruits of that same illegal search. Although respondent is certain to argue that those admissions were not fruits of the illegal search and in fact represented an independent act of free will, respondent has the burden of proving that petitioner's admissions were obtained by means sufficiently distinguishable from the primary illegality to be purged of taint, and it has not done so. Wong Sun v. United States, supra, 371 U.S. at 488. Nor is every voluntary act sufficient to cure an unlawful acquisition of evidence. Id. at 486, n.12.

Rather, this Court is faced with a situation in which petitioner returned to his apartment and discovered that the police had arrested Rios and Moran, had seized not only the narcotics in their possession but also paraphernalia that had been hidden in a suitcase in the closet of the apartment and had found three ounces of heroin during their search of him. Thinking that the police could link him to the heroin in the possession of Rios and Moran through the unlawfully seized paraphernalia and white milk powder and the unlawfully seized heroin found in his possession, petitioner fruitlessly took responsibility for all of the items in the apartment in an effort to free Rios and Moran. The respondent, however, has not and indeed cannot establish that had the police not confronted petitioner with fruits of the two unlawful searches

that he would nevertheless have admitted ownership of the heroin found only in the possession of Rios and Moran. Common sense dictates otherwise; without the fruits of those two unlawful searches, petitioner undoubtedly would have remained silent. There is thus substantial evidence of psychological coercion of petitioner caused by the confrontation of the fruits of the two unlawful searches and that therefore petitioner's admissions were come at by exploitation of the unlawfully seized evidence and should have been suppressed. Harrison v. United States, 392 U.S. 219 (1968). In a case quite similar to the present one, McCloud v. Bounds, 474 F.2d 968 (4th Cir. 1973), the police had induced a confession by confronting the suspect with the fruits of an unlawful search of his motel room; the court rejected the argument of the state that the confession had been voluntary and concluded that it had been "'come at by exploitation'" of the unlawfully seized evidence. Id. at 970.

In finding that the fruits of the unlawful search of the apartment did not prompt the petitioner's admissions, the District Court noted that petitioner was not attempting to disassociate Rios and Moran from the paraphernalia but from the heroin. This simplistic approach, however, misses the point. Petitioner thought that the police could link

him to narcotics found in the possession of Rios and Moran through the paraphernalia and thus he attempted to take the responsibility for the heroin in order to free his friends. But without the paraphernalia and white milk powder, petitioner would have had no reason to admit ownership of anything and it is inconceivable that he would have done so. The presence of the illegally seized narcotics discovered by the police in their search of petitioner merely compounds the taint of his oral admissions and confirms that they were not voluntary but were the products of the violations of his fourth amendment rights.

Furthermore, even assuming that the admissions were only in part tainted by the illegal searches,

> "evidence discovered 'as a result of both legal and illegal leads' is inadmissible, even though 'the legal lead would itself probably have sufficed to uncover the evidence' and . . . the Government is required to 'prove beyond a reasonable doubt that the evidence it introduces was legally obtained'". United States v. Schipani, 414 F.2d 1262, 1266 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970)

Respondent has failed to meet this burden.

Point III

Petitioner's Oral Admissions and the Evidence Seized From Petitioner Following His Arrest Were Tainted by the Illegal Search of Petitioner's Apartment and Should Have Been Suppressed

Assuming that this court should determine that the police did have probable cause to arrest petitioner, it should

nevertheless conclude that for the reasons stated in Point II that the unlawful search of petitioner's apartment tainted not only the paraphernalia and milk powder but all of the evidence subsequently obtained by the police, i.e., the statement of Miss Rios, the heroin found on petitioner and his oral admissions. All were fruits of the illegal search of the apartment and as such should have been suppressed. Wong Sun v. United States, supra; McCloud v. Bounds, supra. The prosecution at both the hearing and at trial was quite careful in establishing that both Rios' statement implicating petitioner and petitioner's oral admissions were made in complete view of all of the evidence seized in the apartment, including the narcotics paraphernalia and the white milk powder. On those occasions, the prosecution wanted to make it clear that when Miss Rios implicated petitioner and when petitioner admitted ownership of the items in the apartment, they both were referring to all of the items seized, including the heroin and currency originally found in the possession of Rios and Moran. As a result, there can be no question that the oral statements of petitioner and Rios were at least in part come at by exploitation of the unlawful search of the apartment and should have been suppressed. United States v. Schipani, supra, 414 F.2d at 1266. Of course, without the paraphernalia and white milk powder, the police clearly had no probable cause to arrest petitioner and thus the heroin found on petitioner was likewise come at by exploitation of the illegal search of the apartment. Wong Sun v. United States, supra.

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

The burden is on the respondent to establish that the illegal action of the police did not induce petitioner's oral admissions and was not exploited by the police in their decision to arrest and search petitioner. Harrison v. United States, 392 U.S. 219, 225-26 (1968); McCloud v. Bounds, 474 F.2d 968 (4th Cir. 1973). Because it has not been demonstrated that the oral and tangible evidence in question was obtained by means sufficiently distinguishable from the underlying illegality, they were not purged of taint and should have been suppressed. Of course, without that evidence the prosecution could not have established petitioner's guilt beyond a reasonable doubt on either count and accordingly, the decision of the District Court should be reversed with instructions to issue the writ.

Point IV

The Admission Into Evidence at Trial of the Fruits of the Illegal Searches and Seizures Was Not Harmless Error

Respondent argued below and the District Court so found that the introduction into evidence of the narcotics paraphernalia and the white milk powder found during the course of the illegal search of petitioner's apartment was

harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963). In so contending, respondent made the specious argument that because the narcotics paraphernalia and the white milk powder were not in and of themselves contraband and possession of them was not itself illegal at the time, their introduction into evidence was clearly harmless error. While the District Court did not accept that argument as such, it did conclude that their introduction was harmless error. Certainly, if one accepts petitioner's argument that in addition to the paraphernalia and white milk powder, the statement of Miss Rios, petitioner's admissions and the heroin found on petitioner were also tainted fruits of one or both of the two illegal searches and as such should also have been suppressed, any contention that the admission of all such evidence was harmless error would be farfetched indeed.

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless." Chapman v. California, supra, 386 U.S. at 23-24. (Emphasis added.)

There can be no question that the cumulative effect of all of this evidence was prejudicial to petitioner.

Assuming, however, that this Court rejects petitioner's contentions that the other evidence admitted against him was tainted as a result of the illegal search of his apartment and concludes that there was probable cause for

his arrest, petitioner nevertheless asserts that the admission into evidence of the narcotics paraphernalia and the white milk powder alone was extremely prejudicial to petitioner, denying him a fair trial and was not harmless error beyond a reasonable doubt.

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. Connecticut, supra, 375 U.S. at 86-87. Accord, Chapman v. California, supra, 386 U.S. at 23.

It is inconceivable that given the facts of this case in which petitioner was not found in possession of the heroin in the apartm ..t and was convicted by circumstantial evidence of constructive possession of those narcotics, that the introduction into evidence of narcotics paraphernalia discovered in a search of petitioner's apartment and which bore traces of heroin could be considered harmless error. The introduction of the paraphernalia and the white milk powder firmly established in the minds of the jurors that although petitioner had not been present in the apartment for several days he was, in fact, intimately involved with the narcotics found in the apartment. The paraphernalia and

the white milk powder provided an independent basis of establishing constructive possession of the narcotics in the apartment; that evidence was the only solid link between petitioner and the crime of first degree possession. A review of the trial transcript reveals that the jury was instructed as follows:

> "Now the question in this case is, whether this defendant had possession of the narcotic drugs found in the apartment, and the other paraphernalia. But we are primarily concerned with the narcotics crime.
>
> "The crime isn't charged with respect to the other paraphernalia. That may be evidence tending to prove or disprove guilt, or innocence. But that's not part of the crime. The crime relates only to the drug.
>
> "The People contend that this defendant's possession is proven in two ways. First, even though he wasn't in the apartment at the time that they found the substance, it was his apartment.
>
> * * *
>
> "And the People would contend that certain inferences arise from that fact alone, that quantity of narcotic drugs which was there, in the custody of the woman he lived with, Antonia Rios, when he was out; and the other items of property that were found there can all be ascribable to him. It was his apartment, and therefore, an inference can reasonably be made that it was his property. His alone." (217-18)

Again, the prosecution could establish its case only by circumstantial evidence and had to prove beyond a reasonable doubt that petitioner had constructive possession of the narcotics. It was the illegally seized evidence

alone that corroborated Jones' testimony regarding petitioner's admissions and the large amount of white milk powder and the large quantity of paraphernalia strongly suggested that the illegal activity in the apartment was an ongoing operation and thus, despite petitioner's absence from the apartment for a few days, he had knowledge of and was intimately involved with the heroin found in the possession of Rios and Moran. The paraphernalia was the key link between petitioner and the crime charged. Lewis v. Cardwell, 354 F. Supp. 26, 42 (S.D. Ohio 1972), aff'd, 476 F.2d 467 (6th Cir. 1973), rev'd on other grounds, 42 U.S.L.W. 4928 (U.S. decided June 17, 1974). Furthermore, there was testimony by the police chemist to the effect that there were traces of heroin on the narcotics paraphernalia (128) and although the respondent argued below that possession of the paraphernalia was not in and of itself illegal, the jury was instructed (223) and there was ample testimony and comment that these "innocent" items were commonly used for the cutting and manufacturing of heroin (21, 32, 79-80, 99, 223). Thus, not only has respondent failed to demonstrate beyond a reasonable doubt that the admission into evidence of the illegally seized narcotics paraphernalia and white milk powder were harmless error, but petitioner would contend that the prosecution relied heavily on those items to establish constructive possession of the heroin found in the possession of the occupants of the apart-

ment. Hence, their use at trial was not harmless error beyond a reasonable doubt. United States ex rel. Savino v. Follette, 305 F. Supp. 277, 283-84 (S.D.N.Y.), aff'd, 417 F. 2d 1070 (2d Cir. 1969)(Per Curiam). Clearly, "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. Connecticut, supra, 375 U.S. at 86-87.

Point V

This Court Should Remand to the District Court for Hearing the Issues Raised by Petitioner's Claim That He Was Illegally Arrested for Loitering as a Pretext to Gain Entrance to His Apartment

Petitioner's final claim is that on the day of his arrest, prior to his returning to the apartment, he was illegally arrested for loitering as a pretext to allow the police an opportunity to gain entrance to his apartment while he was away. Although there is little in the way of factual evidence to evaluate this claim, it did form the basis in part for the dissent by two justices in the Appellate Division (People v. Gonzalez, 38 App. Div. 2d 912 (1st Dept. 1972)) and the record of the proceedings in Criminal Court reflects that petitioner was arrested on October 28, 1970 for violation of the New York Penal Law

§ 240.36 (McKinney Supp. 1973) (Loitering in the first degree) and that the charges were dismissed at the request of the Assistant District Attorney. The Criminal Court record was included in the appendix to petitioner's brief filed with the Court of Appeals of the State of New York. Thus, there is no question that petitioner was in fact arrested for loitering that day.

Although petitioner has not articulated and may be unaware of the evidence the police may have illegally obtained at the time of his arrest for loitering which later contributed to his conviction for possession of narcotics, there is no question that the fruits of an illegal search of petitioner following his illegal arrest for loitering would not be admissible and may have tainted the other evidence admitted against him at trial. Davis v. Mississippi, 394 U.S. 721 (1969); United States ex rel. Newsome v. Malcolm, supra. In this regard, there was some confusion at the hearing regarding the time of the arrests of Rios and Moran although Jones was certain that he received the informant's tip at 12:30. Hence, it is respectfully suggested that this Court remand to the District Court for a hearing on the question of whether during the four-hour period between receipt of the informant's tip and the arrest of Rios and Moran the police had petitioner illegally ar-

rested for loitering and if so whether any evidence, such as his criminal arrest record, was obtained as a result thereof and used as a lead to arrest petitioner for possession of narcotics. Amador-Gonzalez v. United States, 391 F.2d 308, 313 (5th Cir. 1968).

Furthermore, if petitioner was illegally arrested as a pretext to gain entrance to his apartment, even if no evidence were obtained which tainted the subsequent evidence admitted at trial, a hearing is still necessary to determine whether the state exploited its own illegal conduct and deprived petitioner of due process. See United States v. Toscanino, Docket No. 73-2732 (2d Cir. decided May 15, 1974).

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the Government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Justice Brandeis in dissent); accord, United States v. Archer, 486 F.2d 670, 674-675 (2d Cir. 1973).

CONCLUSION

For the reasons stated above, the order appealed from should be reversed and the writ should issue. In the alternative, if this Court should conclude that the writ should not be issued on the basis of the reasons set forth in Points I, II, III and IV above, the case should nevertheless be remanded to the District Court for hearing on petitioner's claim that he was illegally arrested for loitering as a pretext to gain entrance to his apartment.

Respectfully submitted,

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INDEX TO APPENDIX

PRO SE

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE PIERCE

Jury demand date:

78 C. 2138

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
U.S.A. EX REL JOSE GONZALEZ VS. --HON J.E. LA VALLEE SUPERINTENDENT CLINTON CORRECTIONAL FACILITY, DANNEMORA, N.Y. 12929	For plaintiff: JOSE GONZALEZ Box B. DANNEMORA, N.Y. 12929 For defendant:

JEW TRIAL

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	D
J.S. 5 mailed X	Clerk		1/17			
J.S. 6 mailed ✓	Marshal					
Basis of Action: HABEAS CORPUS.	Docket fee					
	Witness fees					
Action arose at:	Depositions					

A1

U.S.A. EX REL, JOSE GONZIAEZ VS. HON J.E. LA VALLEE ETC.

JUDGE PIERCE 73 CIV. 2168

DATE	PROCEEDINGS	Date Order & Judgment Nos.
ay16-73	Filed petition for Writ of Habeas-Corpus.	
ay16-73	Filed Order permitting the pltff to proceed in forma pauperis without prepayment of fees, Ryan, J.	
12-73	Filed Notice of Assignment to JUDGE PIERCE.	
12-73	Filed Order that this action is referred to Magistrate Hartenstine for review & for recommendation, etc. Pierce J. (mailed notice)	
-20-73	Filed Affidavit in Traverse by Petitoner, Jose Gonzalez.	
2.74	Filed Affidavit in opposition by Rochelle M. Baron Asst. U.S Atty.	
2.74	Filed Magistrate's Report by Magistrate Hartenstine.	
1.74	Filed Memorandum Order. The Petition is denied in its entirety. Pierce J. (mailed notice)	
23.74	Filed Notice of Appeal by Petitioner, Jose Gonzalez, from the decision and order of PIERCE, J., denying and dismissing petitioner's writ application on April 1, 1974. Notice mailed by Pro Se Clerk to Jose Gonzalez, #46665, Box B, Dannemora, N.Y.,12929 and to Hon. Louis J. Lefkowitz, Atty General, State of N.Y., 2 World Trade Center, NYC 10047.	
23.74	Filed MEMO ENDORSEMENT on the above Notice of Appeal by Petitioner, Jose Gonzalez. Application for Certificate of Probable Cause and to Appeal in forma properis are hereby granted. SO ORDERED -- PIERCE, J.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
JOSE GONZALEZ,

Petitioner,

- v -

HON. J. E. LA VALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

Respondent.

73 Civ. 2168

APPEARANCES:

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Petitioner Pro Se

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Deputy Attorney General

Attorney for Respondent

LAWRENCE W. PIERCE, D.J.

MEMORANDUM AND ORDER

Jose Gonzalez is a New York State prisoner serving a twenty-year to life sentence imposed on April 19, 1971, after a Bronx County Supreme Court jury returned a verdict of guilty to charges of possession of a dangerous drug in the first and third degrees. He petitions, pro se, for a writ of habeas corpus alleging that certain tangible evidence was unconstitutionally seized, tainting a statement he made at the time of his arrest, and that both the statement and the evidence were improperly admitted at his trial.

This matter was referred to Magistrate Hartenstine, pursuant to 28 U.S.C. §636, and General Rule 35 of this Court, for review and recommendation. This Court hereby adopts the Magistrate's recommendation, if on a somewhat different analysis of the search and seizure issue.

Prior to his state trial, petitioner was afforded a full suppression hearing as to the tangible evidence. Although the state court judge did not make factual findings, or render an opinion, the transcript of the hearing is before this Court and reveals that the state court's decision to admit the statement and the tangible evidence is, to a great

extent, supported by the evidence. The question of taint with respect to the statement did not arise specifically in that hearing, but petitioner apparently raised it during the state appeal process. It is properly before this Court and may be decided on the basis of the suppression hearing transcript, the issue being intertwined with the Fourth Amendment question. Petitioner was also afforded a "Huntley" hearing as to the voluntariness of his statement in the state court. This is not an issue raised here.

The critical facts are not really in dispute. While petitioner was away from his apartment, reportedly arrested for loitering, a police officer acting on a tip gained warrantless access to his apartment by posing as a narcotics buyer. His entry was with the consent of Antonia Rios, the petitioner's girlfriend. Once inside and having purchased 15 glassine envelopes of heroin for $25, the officer arrested Ms. Rios and Luiz Moran, who had emerged from the bedroom to approve the sale and whom the officer had observed packaging white powder in a glassine envelope. When he arrested ~~Rios~~ Moran in the bedroom, the officer also observed, and later seized, seven clear bags containing a white powder (a total of 28 ounces, later found to be heroin), two clear bags and five glassine envelopes, and

$543 in cash--all on the dresser in plain view.

After handcuffing Ms. Rios and Moran, the officer summoned two fellow officers from outside the apartment. The two persons under arrest, still handcuffed and guarded by the two fellow officers, were placed in the living room, while the arresting officer conducted a search of the apartment. In a closet he found a suitcase full of heroin-cutting paraphernalia (a box of clear bags, a scale, a pipe, three spoons, two spoons, scissors, four roles of clear tape, a box of silver foil, two strainers, one package of empty glassine envelopes and a clear bag containing a quantity of empty glassine envelopes). Under the kitchen table he found two containers and a brown bag containing milk sugar.

After this search, Ms. Rios apparently indicated that the petitioner would return soon. The group settled down to wait. He did return and was arrested and searched as he entered the apartment. Five boxes of empty glassine envelopes and a clear bag, containing three and one-half ounces of heroin, were seized from his person. Confronted with the items already seized from the apartment, and the arrests of Ms. Rios and Moran, petitioner told the police that: "Everything in the apartment is mine." At another time while still in the apartment, he said, when questioned

about the money: "It's all mine, every penny of it."

This Court does not find persuasive or supported petitioner's contentions with respect to a possible set-up of his loitering arrest to permit police officers to impermissibly enter his apartment and to gather evidence against him. As the story ends it is true, evidence was gathered against him. But, each step along the way was legitimate. The officers did not have enough information to obtain a warrant when they set out to gain access, but they did have some reason to believe that Ms. Rios would be there and would sell them heroin. She permitted them into the apartment and made the sale. That gave the officers reasonable cause to arrest her and Moran, who was with her and who was observed bagging white powder. In the process of making these arrests, the officers saw even more white powder and narcotics paraphernalia in plain view. The seizure of those items, from the top of the dresser, was proper. An officer is not required to ignore obvious contraband if he sees it from a position which is, itself, lawful. See, e.g., United States v. Pacelli, 470 F.2d 67 (2d Cir. 1972). When this material was seen, the officer was within the proper scope of a search incident to the arrest of Moran. See, Chimel v. California, 395 U.S. 752 (1969).

Given all of these items, the police officers certainly had probable cause to believe that the resident of the apartment was operating a narcotics business therein. Therefore, the arrest of petitioner was lawful, as was the search of his person incident to his arrest inside the front door of the apartment. United States v. Robinson, _____U.S. _____ (#72-936, Slip Op., Dec. 11, 1973).

There remains, however, the issues presented by the search of the apartment which revealed narcotics-cutting material in a suitcase in a closet; and milk sugar under the kitchen table. This search was apparently conducted while Ms. Rios and Moran were immobilized in a separate room and without a hint that the officers had reason to believe that there was anyone else in the apartment who might have been a threat to their persons or to any other evidence in the apartment. It was therefore conducted outside the scope of Chimel v. California, supra. Further, it was apparently conducted prior to the time that Ms. Rios told them that the petitioner was due back in a short time. It would, therefore, appear that there is no viable theory of exigent circumstances which would justify ~~that~~ this warrantless search of the premises, and that the items thus discovered were illegally seized. See, United States v. Artieri, _____F.2d

_____ (2d Cir., #73-1171, Slip Op. at 1593, Jan. 23, 1974).

Thus, the question here is whether the addition of these items to the other, legally seized, evidence (1) impermissibly tainted the incriminating statements made by petitioner and used against him at his trial; and/or (2) prejudiced the petitioner's trial?

This Court holds that it did neither. If the improperly discovered items had not been seized, petitioner would have still been confronted with the 15 glassine bags of heroin which Ms. Rios had sold to the police officer; and seven clear bags of heroin, containing 28 ounces; five more glassine envelopes; and $543 in cash; and the spectre of Ms. Rios and Moran under arrest. Given all these circumstances, it is specious to argue that the addition of milk sugar and more narcotics paraphernalia are the factors which elicited the incriminating statement from petitioner. In fact, it is fair to infer from the content of petitioner's statement that it was not the non-criminal (at that time) possession of milk sugar and paraphernalia from which he tried to disassociate his friends, but the criminal possession of heroin. Thus, as to the question of taint, his statements were properly admitted against him at the trial.

The impact of the illegally seized cutting material and the additional narcotics paraphernalia at his trial is a closer question. Petitioner was charged with possession of the heroin found in the apartment on the dresser. There can be no doubt, as the trial judge instructed the jury, that such paraphernalia "may be evidence tending to prove or disprove guilt, or innocence." Such evidence, although non-criminal itself, is admitted as relevant to the issue of knowledge of the defendant on trial for possession, and is particularly damaging when the state's case is necessarily based on constructive possession. In this instance, however, this Court concludes that the other tangible evidence, legally seized, was overwhelming as to this issue and that the illegally seized evidence was merely cumulative. Its admission was harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

The petition is hereby denied in its entirety.

SO ORDERED.

Dated: New York, New York
April 1, 1974

LAWRENCE W. PIERCE
U. S. D. J.

COPY OF THE WITHIN PAPER
RECEIVED
DEPARTMENT OF LAW

JUL 31 1974

NEW YORK CITY OFFICE
ATTORNEY GENERAL